Supreme Court, U.S.
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No. 92-1287

In the
Supreme Court of the United States
October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON
Petitioners,
v.
FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH MICHELS,
DENNIS NICEWANDER, DON GARDNER,
MARILYN FLOYD, LEONARD BERRY,
and ANTHONY CATANESE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The parties to the proceeding below were petitioners, Robert Taylor and Dr. Timothy Cotton, and respondents, Helen Popovich, Kenneth Michels, Dennis Nicewander, Don Gardner, Marilyn Floyd, Leonard Berry, Anthony Catanese, and Florida Atlantic University ("FAU"). FAU is a public university of the State of Florida under the Florida Board of Regents. All of the individual respondents were sued in their official and individual capacities, except for respondent Catanese, who was sued in his official capacity only, being substituted on April 12, 1991, for respondent Popovich in her official capacity. None of the petitioners are corporations subject to the requirements of Supreme Court Rule 29.1.

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Supplemental Statement of the Facts

Respondents seek to marginalize this case as an isolated factual dispute resolved by a jury, with no overriding issues of importance. Certainly, this case involved conflicting evidence. Here, however, the significance of this case as a precedent is enhanced -- not undermined -- by the underlying factual disputes. The erroneous legal rulings below demonstrate the broad impact of "isolated" errors by federal courts upon the law generally. How can any jury correctly evaluate disputed evidence when they are given erroneous instructions concerning the elements of a First Amendment claim? Likewise, how can a jury intelligently weigh conflicting evidence when the lower courts, in violation of the rules of evidence, exclude clearly admissible expert testimony explaining the *modus operandi* in such cases? Thus, the issues presented, while important to this case, also have broad significance beyond this case and merit the issuance of a writ of certiorari.

Though purported conflicts in the parties' statements have little significance to the issues presented, respondents' statements contain inaccuracies that should be corrected. First, respondents Michels, Nicewander, and Berry ["Michels respondents"] and Florida Atlantic University, Popovich, Gardner, and Catanese ["FAU respondents"] incorrectly suggest that Taylor approved of the Gulfstream Micro Systems ["Gulfstream"] computer purchase. Michels Reply, 4; FAU Reply, 4-6 . Although Taylor did approve the *compatibility* of the computer, he did not give general approval to the purchase; indeed, he expressed his disapproval to his superiors. He spoke to John Morak, who would normally evaluate the propriety of such purchases, and Morak then refused to sign the approval. Nicewander (Morak and Taylor's supervisor) later approved the purchase while Morak was on vacation (R19, 669-72).

Second, respondents incorrectly state that petitioners did not try FAU internal routes before going to the State Attorney. Michels Reply, 4. In fact, Taylor first reported the improper Gulfstream purchase to FAU's Computer Advisory Committee and then told a trusted co-worker, Dr. Munson, who told FAU's Administration (R19, 664-66; R17, 231-33). Taylor, Cotton and Munson went to the State Attorney only after both the Advisory Committee *and* the Administration ignored their reports.

Third, respondents claim that State Attorney Valentine found nothing improper, and then he turned the investigation over to the Florida Board of Regents' Internal Auditor Director Sweeney, who compiled a report on his own. Respondents incorrectly allege that the report contained no lawful or ethical violations. Michels Reply, 5; FAU Reply, 7. Also, respondents claim that FAU's reorganization and the resignations of Michels and Nicewander resulted from bad press, and not from the report. Michels Reply, 6; FAU Reply, 8-9. However, Valentine found improprieties sufficient to turn over the investigation to Sweeney. Sweeney and Valentine then compiled a *joint report*, which concluded, *inter alia*, that there had been an improper allocation of resources, poor management, inadequate supervision, and most importantly, circumvention of normal procedures by academic administrative personnel in acquiring goods (R17, 273-84, P.Ex. 25).[1] President Popovich asked for Nicewander's and Michels' resignations as a direct result of serious improprieties

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[1] The Michaels respondents admit "the report ... was critical of upper-level management's supervision of mid-level management." Michaels Reply, 5.

publicized by the *joint report*, and ultimately, by the press. The attempt by FAU administration to suppress the publication of Taylor's charges with a "gag order" demonstrates the gravity of the charges and their implications (R18, 424-26; R19, 778-79; R28, 2687-88).

Finally, respondents fail to mention that most of Taylor and Cotton's speech was deemed by the district court to be protected under the First Amendment (a ruling which respondents did not appeal). *See* Petition, 13 and n.3.

REBUTTAL ARGUMENT

I. The Decisions Below Substanitally Impair § 1983 Redress for Violations of First Amendment Rights by Improperly Interposing An Intent Element

A. The Importance Of The "Intent" Charge

Respondents do not contest that the district court's jury charge included "intent" as an element of a § 1983 claim. However, they argue that no error resulted, because petitioners' accusations were based on intentional conduct.

Respondents, however, have ignored that petitioners' allegations and evidence also averred guilt by lesser degrees of culpability, such as reckless indifference. The erroneous "intent" instruction came early in the jury charge: the district court instructed the jury that to find defendants liable, they must find the defendants had "intentionally" violated the plaintiffs' rights. Petition, 17a. This intent instructions permeated all elements of the ensuing § 1983 charge, in direct violation of this Court's prior rulings that "intent" is not required under § 1983.

Respondents further argue that the "intent" jury instruction is harmless, because "the instructions regarding conspiracy made it clear that the other participants could be held liable, assuming the jury found a deprivation, even if Gardner acted innocently." FAU Reply, 20. This argument ignores the part of the conspiracy charge which instructed the jury that they still must "find in plaintiffs' favor *with respect to each of the things he must prove as to either defendant*... Otherwise, ... you need not consider the claim of conspiracy." Petition, 18a. Thus, the jury was instructed that intent was one of "the things [plaintiffs] must prove as to either defendant" to establish a conspiracy. *Id.*

Respondents also argue that the intent charge was justified because non-intentional acts were not included in the pleadings. FAU Reply, 18-19; Michels Reply, 11-14. However, the pleadings *did include* a conspiracy charge, which, by definition, includes non-intentional acts, such as a reckless and callous failure to investigate (*i.e.*, by Gardner) or to supervise (*i.e.*, by Michels, Nicewander and Popovich). There is no necessity to plead each of these non-intentional acts separately.

Furthermore, the harm from the intent charge was exacerbated by the court's refusal of petitioners' requested instruction on withdrawal from conspiracy (R30, 2994-96). A conspirator can withdraw from the conspiracy only by "[t]aking affirmative action to defeat or disavow its purpose." *United States v. Diaz*, 662 F.2d 713, 716 (11th Cir. 1981). Michels and Nicewander claimed withdrawal as a defense (R27, 2428-29, 2432-34; R28, 2693-96). While the burden of proving withdrawal should have rested on Michels and Nicewander, the improper intent instruction,

coupled with the refusal of a withdrawal instruction, shielded these respondents from liability. Petition, 14.

Similarly, the harm inflicted by intent instructions magnified the district court's failure to include an "innocent intermediary" instruction. Gardner detailed how he refused to listen to Taylor or Cotton about their whistleblowing and subsequent retaliation, as proof that he was not involved in the retaliation. FAU Reply, 14-15. However, an innocent intermediary instruction would have explained that Michels and Nicewander could have been held responsible, even if Gardener was innocent. *United States v. Lester*, 363 F.2d 68, 73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). *See also United States v. Giles*, 300 U.S. 41 (1937). Without such an instruction, the jury was forced to conclude incorrectly that Gardner's "ignorance" of the conspiracy (*i.e.*, his lack of intent) in recommending termination shielded him from liability, and that Michels and Nicewander, who created bad will towards petitioners, could not be held responsible either.

Furthermore, Gardner could have been held liable under the correct jury instruction. Gardner's self-imposed ignorance of the past shows a callous indifference towards any conspiracy to terminate petitioners. FAU Reply, 14. Correctly instructed, *i.e.*, minus the intent element, the jury could have found that the protected speech was a substantial, motivating factor in the terminations. Gardner cannot intentionally ignore facts which should have prompted him to investigate. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). The intent instruction improperly "stacked the deck" against plaintiffs, precluding the jury from evaluating respondents' liability.

B. The Split Among The Circuits On State Of Mind

Respondents assert that there is no split among the circuits regarding intent as an element of a § 1983 claim. Michels Reply, 14-18. Yet, they also inconsistently criticize the clear ruling in *Caberello v. City of Concord*, 956 F.2d 204, 206-07 (9th Cir. 1992), that violation of § 1983 does *not* require intent, calling it a "misunderstanding in the necessary elements in a Fourth Amendment claim." Michels Reply, 16. Respondents' discussion of *Caberello* admits and highlights the divergence among the circuits on the § 1983 state of mind requirement. Also, they cite no Supreme Court authority holding that intent is an element of a First Amendment violation. This issue, therefore, merits the grant of a writ of certiorari.

C. Parratt Has Not Been Totally Overruled

Respondents claim that the *Parratt v. Taylor*, 451 U.S. 527, 686 (1981), holding that § 1983 contains no intent requirement, is no longer binding, because subsequent opinions do impose an intent requirement. Michels Reply, 15, *citing Daniels v. Williams*, 474 U.S. 327 (1986), *Brower v. County of Inyo*, 489 U.S. 593 (1989), and *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). But, none of the prisoner cases they cite have overruled *Parratt* to impose intent as a general element of a claim under § 1983.

In *Daniels*, this Court only "overrule[d] *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." 474 U.S. at 330-31. *Brower* involved a § 1983 claim that police officers violated plaintiff's Fourth Amendment right against

unreasonable search and seizure. Nothing in *Brower* interposes intent as a requirement of either the Fourth Amendment or § 1983. Finally, in *Wilson*, a prisoner claimed an Eighth Amendment violation. While *Wilson* addressed intent as related to an Eighth Amendment violation, *Wilson*, 111 S.Ct. at 2322, it created no general intent requirement under § 1983. Thus, respondents' assertion that *Parratt* is "now receded-from dicta," Michels Reply, 15, is patently false.

D. The Intent Charge Reaches Beyond This Case

Though lower courts have differed on whether § 1983 or the First Amendment require an element of intent, *see* Petition, 15-20, this Court has never so held. Thus, the significance of the legal ruling below extends beyond this case; it provides a basis for future courts to shield retaliatory conduct by incorrectly heightening the plaintiff's burden of proof.

The adverse impact of the "intent" charge herein illustrates the impact of the ruling below. If intent is interposed as an element of plaintiff's proof, plaintiff's difficult burden becomes nearly impossible to meet. It sanctions retaliatory conspiracies under the guise of recklessness or indifference. *See* Petition, 20-22. It chills the free exercise of speech on matters of public importance, *i.e.*, public corruption and waste, in direct contravention of the First Amendment goal of encouraging such free speech. *See* Petition, 19. By adding an intent element, the courts below have undermined First Amendment rights and perverted § 1983 requirements. This departure from established law and the divergent views of the circuits provide a substantial basis for granting a writ of certiorari.

II. The Evidentiary Rulings Below Improperly Prohibit Use of Expert Witnesses in Establishing Patterns and Practices of Retaliation

Respondents argue that the trial court's exclusion of the testimony of Thomas Devine, a nationally prominent expert on whistleblowing and retaliatory responses, was merely an isolated exercise of permissible discretion. However, the exclusion of Devine's testimony was much more; the district court's own reasons demonstrate that it was based on fundamental misconceptions concerning the type and scope of evidence admissible under Fed.R.Evid. 702 and 704. *See* Petition, 23-24. The significance of the lower court's error is that it approves an inappropriately narrow construction of the type of experts who can testify and the scope of their testimony.

Devine's *modus operandi* testimony would have provided a context for the seemingly innocent and isolated facts. In excluding this testimony, the court ruled that: (1) it was not sufficiently scientific; (2) testimony concerning patterns in other cases and resulting conclusions are outside the scope of the rules; (3) the testimony was inadmissible because it reached an ultimate conclusion.

First, the district court judge erred in stating that the testimony would not be sufficiently "scientific" to come within the scope of the rule. The Advisory Committee's Notes to Rule 702 state that the test is whether use of the expert will assist the trier of fact: "The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' *but extend to all 'specialized' knowledge*." Fed.R.Evid. 702 Advisory Committee's Notes (emphasis added). *See also* Petition, 23-24.

Second, the ruling below unduly narrows the scope of expert testimony. Devine's proposed "modus operandi" testimony does not differ from other such testimony that has been uniformly admitted. Thus, the erroneous ruling below impacts the law by narrowing the scope of expert testimony in contravention of the plain language of the Rules, the Advisory Committee Notes, and the jurisprudence. *See* Petition, 25-26, and authorities therein.

This impact is demonstrated by this case. Without an expert to decipher the underlying culture, whistleblowing retaliatory conduct in the academic setting may seem as innocent as patterns of illegal narcotics activity (*United States v. Dunn*, 846 F.2d 761 (D.C. Cir. 1988)), or of illegal securities practices (*Vucinich v. Paine, Webber, Jackson, & Curtis, Inc.*, 803 F.2d 454 (9th Cir. 1986)) do without expert testimony. In fact, university administrative culture is better established than criminal culture, with its own dress code, language, annual conventions, journals and newsletters, *and code of conduct*. *See* FAU Reply, 10 (characterizing Taylor as "blue collar mentality"). There is nothing "scientific" about expert testimony regarding illegal narcotics dealing or security trading practices. However, under the rulings below, testimony regarding these cultures also would be patently inadmissible.

Third, the lower courts' ruling that expert testimony on ultimate facts is inadmissible directly conflicts with Fed.R.Evid. 704. The Advisory Notes clearly state that Rule 704 *abolished* the prior rule prohibiting such testimony. Also, this Court has stated: "Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on 'ultimate issues.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988). The rulings

below substantially, incorrectly, and impermissibly narrow the scope of the Federal Rules of Evidence. The importance of this error merits granting a writ of certiorari.[2]

CONCLUSION

For the foregoing reasons, petitioners Taylor and Cotton submit that this Court should grant their petition to issue a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

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[2] Finally, respondents argue that because Adelaide Snyder testified regarding her first hand knowledge of *some* retaliatory events, an expert would not assist the jury. FAU Reply, 24. This argument is meritless. There is no rule that prohibits expert testimony merely because a fact witness also testified. Without an expert's interpretation of such testimony, particularly "pattern and practice" testimony, the jury may not recognize certain conduct as illegal.